Thompson Hine

# Transportation Update

October 2022

## FMC Proposes Rule to Define Ocean Carrier "Unreasonable Refusals to Deal or Negotiate Vessel Space Accommodations"

On September 13 the Federal Maritime Commission (FMC) issued a notice seeking public comments on its proposed rule regarding a new requirement in the Ocean Shipping Reform Act of 2022 (OSRA 2022) that would prohibit ocean carriers from unreasonably refusing to deal or negotiate with respect to vessel space accommodations. Specifically, the proposed rule defines elements necessary to establish a violation and criteria it will consider in assessing "reasonableness." Comments on the proposed rule are due on October 21.

On June 16 President Biden signed into law OSRA 2022, which contains a package of U.S. shipping law reforms intended to address supply chain disruptions, rising ocean shipping costs, and inadequate vessel service for U.S. exporters and importers in the aftermath of the COVID-19 economic lockdowns. Among other things, OSRA 2022 amends 46 U.S.C. 41104(a), which prohibits ocean common carriers from unreasonably refusing to deal or negotiate, by expanding this prohibition to expressly include dealings and negotiations "with respect to vessel space accommodations provided by an ocean common carrier." OSRA 2022 also directs the FMC to initiate a rulemaking to define how it would interpret and enforce this new requirement.

The FMC proposes that complainants must meet three criteria to establish a violation for unreasonable refusals to deal or negotiate regarding vessel space:

- The respondent is an ocean common carrier under FMC jurisdiction
- The respondent refuses to deal or negotiate with respect to vessel space
- The refusal is unreasonable

Once a party establishes a *prima facie* case for each of these three criteria, an ocean common carrier will have the burden to show why its refusal of vessel space is reasonable. Specifically, the proposed rule contains a non-exhaustive list of factors the FMC will consider in its reasonableness analysis, which include determining if the ocean common carriers' decisions are based on legitimate business decisions involving good faith negotiations or motivated by legitimate transportation factors. According to the FMC, transportation-related factors include considerations such as the character of the cargo, vessel safety and stability, operational schedules, and the effect of blanked sailings. The FMC is proposing that an ocean carrier may support the reasonableness of its conduct by providing a certification attesting that its vessel space decisions and evidence are correct and complete. Further, the rule includes a rebuttable presumption of unreasonableness for those situations where an ocean common carrier categorically excludes U.S. exports from its backhaul trips from the U.S.

## FOR MORE INFORMATION

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